Nos. 01-950 and 01-1018

Supreme Court U.S.
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In The

Supreme Court of the United States

HILLSIDE DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., ET AL.,

Respondents.

PONDEROSA DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that Congress, by enacting Section 144 of the Farm Bill of 1996, has exempted provisions of California's milk pooling and pricing regulations from challenge under the Commerce Clause.

2. Whether the Petitioners state a claim under the Privileges and Immunities Clause, when it appears on the face of the complaint that the Petitioners suffered no disability based upon their residency or citizenship.

PARTIES

The Petitioners in *Hillside Dairy, et al. v. Lyons*, docket number 01-950, are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms (hereinafter "the *Hillside* Petitioners"). The Petitioners in *Ponderosa Dairy, et al. v. Lyons*, docket number 01-1018, are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, dba D. Kuiper Dairy (hereinafter "the *Ponderosa* Petitioners"). The *Hillside* and *Ponderosa* Petitioners are collectively referred to as Petitioners.

The Respondents in both cases are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture (hereinafter "Respondents"). Respondents are hereby opposing the petitions in both cases in this single brief in opposition.

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STATEMENT

There is no reason to grant certiorari in these cases. The Court of Appeals' decision properly applies settled rules of law to a specific statute of limited application, and does not conflict with any decisions of the other circuits. The decision in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), controlled the decision below, and Petitioners' attempts to limit Section 144's broad exemption from the Commerce Clause should be addressed to Congress.

Petitioners rely on broad, unsupported assertions that this Court's failure to grant certiorari will negatively impact the nation's milk industry. Not only is there no threat of national importance, the subject provisions, on their face and in application, provide out-of-state producers benefits not enjoyed by their California counterparts, and therefore do not impose any burden on interstate commerce. Petitioners' disagreement with the Court of Appeals' analysis, and their desire to roll back the 1997 amendments to garner even more regulatory favoritism, are not enough to warrant this Court's grant of certiorari. The 1996 Farm Bill's plain and sweeping language demonstrates Congress' unmistakable intention to empower California to continue in effect its fluid milk standards and all laws or regulations directly or indirectly related thereto, including its pricing and pooling programs, as recognized by the *Shamrock* court.

I. California's Commerce Clause Exemption In The 1996 Farm Bill

On April 4, 1996, President Clinton signed into law the omnibus Federal Agriculture Improvement and Reform Act of 1996, also known as the 1996 Farm Bill. *See* 110 Stat. 888 (1996), Pub. L. No. 104-127. (Title I of the Act, containing Section 144, was entitled the Agriculture Market Transition Act.) Section 144 of the 1996 Farm Bill states as follows:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, *directly or indirectly, to establish or continue to effect* any law, regulation, or requirement regarding –
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7254 (emphasis added). Contrary to the Petitioners' characterization, Section 144 does not merely save California's fluid milk standards from preemption. Congress' sweeping language exempts California's interrelated milk pooling and pricing provisions that work as a means of "effecting" California's fluid milk standards.

II. California's Fluid Milk Laws

In order to moderate the often-volatile forces that historically have affected the production and marketing of milk, and to ensure a stable milk supply, both the

federal government and many states, including California, established milk marketing and milk pooling programs for specific geographic areas. *See* 7 U.S.C. § 601; Cal. Food & Agric. Code §§ 61801, 61802, 62700-62702, Respondents' Appendix at App. 1-7.[1]

Raw milk consists of three components: fat, solids-not-fat (protein, calcium, and lactose, for example), and fluid carrier (primarily water). California's Stabilization and Marketing Plan sets a price for each milk component depending on the class of products the processor creates with the milk. The program classifies milk products into five categories, from fluid milk ("Class 1") to cheese ("Class 4b").

Before pooling, a significant number of milk producers (dairy farmers) seeking the high prices placed on Class 1 milk sometimes engaged in destructive trade practices, agreeing to "supply" contracts with Class 1 fluid milk processors who would demand monetary concessions from the producer in return. To address such destructive trade practices, California passed the Gonsalves Milk Pooling Act of 1967, Cal. Food & Agric. Code sections 62700 *et seq.*, Resp. App. 3 *et seq.* The goal of pooling under the Act was simple: Milk producers would pool their revenue to eliminate the destructive trade practices that appeared in the industry. Cal. Food & Agric.

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[1] Relevant excerpts of California's Food and Agricultural Code, and its Pooling Plan for Market Milk, As Amended Effective July 1, 1997, are attached in Respondents' Appendix.

Code § 62701, Resp. App. 3-4. The pool would account for revenues received from processors such that California producers would receive blended prices, based on the entire pool's milk usage.

California's system establishes two milk prices for California producers: a "quota" price, and a "base/overbase" price. Cal. Food & Agric. Code § 62711, Resp. App. 6. "Quota" refers to an allocation a California producer may hold based on historic or increased Class 1 milk production, or the purchase of quota from other producers. Cal. Food & Agric. Code § 62703, Resp. App. 5. A producer's "quota" allocation entitles the producer to receive a higher price for a certain amount of milk. "Overbase milk" is milk that is produced in excess of the amount of milk designated as "quota milk." Many California producers own no quota at all, and receive only the "overbase" price for their milk.

A. Pooling Prior to the Amendments

Under most pooling plans, including California's, funds are not collected from all milk processors and then redistributed to milk producers. A processor is charged an "in-plant blend price" based on the end use to which that processor's milk is put, and the minimum prices for each of those products. This in-plant blend price is then multiplied by the total amount of raw milk that the processor has received from its producers to yield a processor's "gross pool obligation." Amended Pooling Plan for Market Milk, Article 9, sections 900(a), (b), Resp. App. 7.

Processors pay each of their California producers based on the quota and base/overbase prices. Processors receive a credit against their gross pool obligation equal to the minimum total amount that they must pay their California producers. If a processor's gross pool obligation is higher than the credit, which typically happens to Class 1 processors, then the processor pays the difference (net pool obligation) to the pool. Conversely, if a processor's gross pool obligation is less than the credit, then the processor receives monies from the pool which it can use to pay its producers.

Formerly, California milk processors who received raw milk from producers outside of California received credit at the in-plant blend price. Because a processor's pool obligation was equal to the in-plant blend price, processors by definition could not owe any amount to the pool on account of such milk. The mathematical effect of the Department's accounting procedures was to credit California processors receiving raw milk from out-of-state as though they had paid the full in-plant blend price to obtain it. By contrast, processors incurred a pool obligation (equal to their in-plant blend price) for California raw milk, for which these Class 1 processors only received a credit no greater than the quota price, which was typically less than their in-plant blend price. Therefore, for Class 1 milk processors, out-of-state producers were treated substantially better than their California counterparts, because the pooling credits effectively placed a higher value on out-of-state milk than milk produced in the state.

In particular, this regulatory loophole created an incentive for out-of-state dairies to selectively ship milk

to Class 1 processors in California, or to "cherry pick" this portion of the market. Petitioners relied upon this discrimination in their favor to bargain for higher prices than were available to California producers while increasing their production insulated from competition. Some producers went so far as to move their dairy operations from California to Nevada, selling their California quota in the process. Others opened new dairies out-of-state in addition to their in-state dairies. This loophole was so large, some California producers and producer cooperatives began to take advantage by intentionally shipping raw milk out of the State and then immediately returning the same amount to California to generate substantial profits.

Because of the inherent unfairness of the pre-amendment regulatory structure, on September 25, 1996, certain milk producers petitioned the California Department of Food & Agriculture to amend the Pooling Plan to eliminate the loophole favoring out-of-state producers and ensure that the California regulatory system treated all milk more evenhandedly.

B. The Amended Pooling Plan and Interstate Commerce

Under the Amended Pooling Plan, Class 1 processors who acquire and process out-of-state raw milk receive a credit against their gross pool obligation which, under usually-applicable market conditions, is better than the credit they would have received had the milk been produced in-state. The credit is equal to the lower of the processor's in-plant blend price or the quota price. Since

a Class 1 processor's quota price is almost always lower than the in-plant blend price, Class 1 fluid milk processors will almost always receive a credit at the quota price for their use of out-of-state milk. Crediting the processor at what is usually the highest level available can still entail significant incentives to the California processor to acquire milk from out-of-state. Moreover, the out-of-state milk is credited at the quota price even though the out-of-state producer supplying the milk has not had the expense of purchasing quota.

Out-of-state producers are free to compete with in-state producers by negotiating any price for their Class 1 milk within the State of California, including a price below the quota price, and processors have an incentive to acquire such milk because they receive a credit against their pool obligation for this out-of-state milk at the full quota price, under typical conditions. Thus the amended pooling plan still preserves incentives for processors to acquire milk from out-of-state producers, while discouraging the incentive for in-state producers to send their milk on artificial "round trips" outside the state to obtain the beneficial treatment given to out-of-state milk prior to the amendments.

Contrary to Petitioners' repeated representation that the 1997 pooling plan amendments have resulted in "a dollar-for-dollar reduction in the price received by out-of-state dairy farmers on their California raw milk sales," the amended pooling plan does not dictate what price out-of-state producers receive for their milk. Instead, out-

of-state producers may freely negotiate with California processors for their in-state milk sales.[2]

The amendments effectively achieved their primary purpose, to discourage the round-tripping of milk. The exportation of milk decreased immediately following the amendments of July 1, 1997, in close proportion to an immediate decrease in imports. Indeed, when factoring out "round-tripped" milk, the importation of milk has increased above pre-amendment levels. This proves that, far from erecting a barrier to trade, the amendments have continued to encourage the importation of milk into California.

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[2] Missing from the petitions is any mention of the fact that producers in both cases have contracted away their ability to negotiate for the price of their milk. The Hillside Petitioners are four northern Nevada dairy producers, who were until recently members of California Gold ("Cal Gold"), a California dairy cooperative. Cal Gold recently merged with Dairy Farmers of America ("DFA"), a national cooperative with over 18,000 members. The Hillside Petitioners entered into membership agreements with Cal Gold, now assigned to DFA, requiring them to market all of their milk through their cooperative. The Ponderosa Petitioners are also part of a cooperative. The Ponderosa Petitioners are two southern Nevada milk producers (Ponderosa Dairy and Pahrump Dairy), a California corporation which owns dairy farms in Nevada and California and a dairy processing facility in California (Rockview Dairies, Inc.), and an Arizona milk producer (D. Kuiper Dairy). These out-of-state dairies also marketed their milk through a cooperative, Security Milk Producers. Thus Petitioners have ceded their right to negotiate the price and destination of their milk to their cooperatives.

II. The Proceedings Below

Petitioners alleged below that the 1997 amendments are preempted by the Commerce Clause, and that they discriminate against out-of-state milk producers in violation of both the Equal Protection Clause and the Privileges and Immunities Clause. Pet. App. A3.

The district court granted the Defendants' motion to dismiss both the equal-protection claim and the privileges-and-immunities claim. Pet. App. A5. Defendants moved for summary judgment on the commerce-clause claim, and that motion was also granted. Pet. App. A21. Plaintiffs appealed and the appeals were consolidated for decision.

The Ninth Circuit first addressed Petitioners' claim that 1997 amendments to the Pooling Plan violate the Commerce Clause. The panel concluded, as did the district judge, that Petitioners' commerce-clause claim was identical to the claim previously considered and disposed of by another panel in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied by Shamrock Farms Co. v. Veneman*, 525 U.S. 1105 (1999). As it had in *Shamrock Farms*, the State argued that the intended sweep of Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, encompassed California's pooling plan. The Court of Appeals below agreed and affirmed the district court's grant of the State's motion for summary judgment. Pet. App. A5-A10.

The court also affirmed the district court's dismissal of Petitioners' equal-protection claim for failure to allege that the asserted discriminatory effect of the pool plan on out-of-state producers is unrelated to important state

interests. Pet. App. A10-A13. Petitioners had been given leave to amend, but chose not to avail themselves of the opportunity to correct their complaint. Pet. App. A12.

Finally, the Court of Appeals affirmed the district court's dismissal of Petitioner's claim under the Privileges and Immunities Clause. Noting that discrimination on the basis of a citizen's state of residency is essential to a claim under this provision of the Constitution, *Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990), the court rejected the complaint of unlawful discrimination because the classifications created by the pooling amendments are based on the location of the dairy herd and operation, not the citizenship or residency of the operation's owner. A14.

Petitioners have abandoned their claim that the 1997 amendments to California's pooling plan deprive them of equal protection of the laws. Petitioners seek review only of the lower court's dismissal of claims under the Commerce Clause claim and the Privileges and Immunities Clause. Neither Petitioner asserts grounds sufficient under Rule 10 to justify this Court's review.

ARGUMENT

PETITIONERS FAIL TO STATE GROUNDS SUFFICIENT UNDER RULE 10 TO WARRANT A GRANT OF CERTIORARI

A. Petitioners Offer No Data to Support Their Assertion That This Is a Case of National Significance

Petitioners in No. 01-1018 make the sweeping assertion that this Court's failure to grant certiorari "will affect the livelihood of every dairy farmer in the nation." Ponderosa Dairy Pet., p. 7. They protest that the decision below "is of no small consequence to farmers from Arizona to Minnesota and New Hampshire," Ponderosa Dairy Pet., p. 8, but no Minnesota or New Hampshire farmer is party to this action – or to any other action challenging the 1997 amendments. No facts are given to support Petitioners' exaggerations: nothing more than a vague, and rather disingenuous footnote, insinuating that California's amendments are responsible for the entire national drop in dairy-farmer cash receipts. Ponderosa Dairy Pet., p. 7 n. 3. Indeed, Petitioners cite, without apparent quarrel, California's 1999 assertion that "Extraordinary milk production in all of the major milk production regions (particularly in the states west of the Rocky Mountains) has been a major contributor to *low commodity prices.*" *Id.* (emphasis added). This is inconsistent with Petitioners' earlier, unsupported, suggestion that the 1997 amendments will result in *higher* commodity prices.

Petitioners in No. 01-950 also make the sweeping assertion that the decision below, "threatens to impose

costs and burdens that reach far beyond the interests of these Petitioners." Hillside Dairy Pet., p. 11. But again, no supporting facts are provided. These petitioners do point to statements made in an amicus brief to the effect that the 1997 amendments have resulted in a drop in Nevada dairy revenues. Hillside Dairy Pet., p. 12. But Respondents would suggest that any such reduction results from the loss of the pre-1997 *advantage* enjoyed by producers of out-of-state milk over California producers, rather than by any *disadvantage* vis-a-vis California producers. Furthermore, whatever these losses might be, they are shared by *California* owners of dairies located in Nevada. Ponderosa Dairy and Pahrump Dairy, petitioners in No. 01-1018, for example, are owned by a California corporation and partnership, respectively. Ponderosa Dairy Pet., p. 3.

In fact, as explained, California's amended pooling plan still operates to the unique benefit of out-of-state producers. Petitioners' vague, unsupported claims of a threatened national catastrophe are no more real than their own allegations of harm.

B. Petitioners' Commerce Clause Questions Do Not Satisfy Rule 10, But Merely Invite The Court to Review an Alleged Misapplication of The "Clear Statement" Rule by The Court of Appeals

Petitioners' questions are either misleading or fail to reveal a credible Rule 10 basis for certiorari. Petitioners in No. 01-950 frame their question so as to suggest that there is a conflict between the decision below and this Court's

decision in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). *See* Hillside Pet., p. i. But *Baldwin* has nothing whatsoever to do with construction of a federal statute regulating interstate commerce.[3] Petitioners in No. 01-1018 seek to have this Court resolve (a) an evidentiary question concerning the relevance or admissibility of proffered evidence of legislative intent, and (b) a question of the evidence to be considered by the court in discerning legislative intent. Ponderosa Pet., p. i. These are hardly compelling reasons for certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.") Petitioners in No. 01-1018 assert that "There Is a Compelling Need for Guidance by this Court to Further Instruct Lower Courts Concerning Application of the 'Clear Statement' Standard," Ponderosa Pet., p. 8, but their petition points only to the decision of the court below as "not faithfully apply[ing]" the "clear statement" standard. No other cases are cited as evidence of any confusion among the lower courts on this point, such as might require this Court's "guidance."

Moreover, there is no evidence that the circuit court is unclear about the need to find a "clear statement" of congressional intent. Indeed, the rule was applied by the court in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), and Petitioners have not suggested that the Court of Appeals

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[3] *Baldwin* concerned a 1935 challenge to a state milk-pricing statute under the Commerce Clause, without reference to any congressional expression on the matter. In the instant case, Congress has expressed itself, and the question is one of discerning Congress' intent – a question not presented to the Court in *Baldwin*.

misunderstood the rule in that case, at least insofar as the court there construed Section 144 to exempt California's milk-composition standards from preemption under the Commerce Clause. There is, therefore, no dispute that, by Section 144, Congress made a "clear statement" of intent to exempt *some* aspect of California's regulation of milk production. The only dispute is over the intended *scope* of that exemption.

Indeed, Petitioners are themselves inconsistent in describing what they believe to be the "clear statement" rule, demanding in one instance a "clear and unambiguous expression of legislative intent," Ponderosa Pet., p. 15, but then acknowledging that a "clear statement" may have to be discerned from the context of the language, "if not expressly contained in the statutory text." *Id.* at 16; *see also,* Hillside Pet., p. 24 ("Proper statutory construction . . . requires courts to look at the section in full context.")

In point of fact, Petitioners' complaint is not the absence of a clear statement of congressional intent to exempt California's milk laws from preemption under the Commerce Clause. It cannot reasonably be disputed that there is quite a "clear statement" of congressional intent to exempt *some* aspect of California's milk laws. 7 U.S.C. § 7254. Petitioners' complaint is that the Court of Appeals engaged in statutory construction to determine that the *scope* of that congressional intent encompasses California's pricing and pooling laws,[4] and Petitioners disagree

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[4] In point of fact, the specific question presented by Petitioners in No. 01-1018 is even less deserving of this Court's

with the court's analytical methodology. But that is not a sufficient basis for certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law.")

In any event, the Court of Appeals had it right when it determined that Section 144 exempted the subject pooling plan amendments. Each of the challenged provisions is interrelated to California's fluid milk standards. The California Legislature has declared that the pooling plan is "enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state." Cal. Food & Agric. Code § 62704, Resp. App. The Legislature also declared the vital importance of these provisions to milk content:

> It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; *that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content,* free from contamination, is vital to public health and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare . . . .

Cal. Food & Agric. Code § 62701. The Court of Appeals properly concluded that the Amended Pooling Plan works as a means of "effecting" California's fluid milk standards.

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attention, concerning as it does the weight to be given proffered indicia of legislative intent.

C. In This Complicated And Highly Regulated Area of Milk Production, Petitioners Have a More Appropriate Forum in Congress And The Secretary of Food and Agriculture For Seeking Clarification of Any Asserted Misunderstanding of Congressional Intent

Petitioners themselves acknowledge that Title 1, Subtitle D, Chapter 1 of the 1996 Farm Bill, 7 U.S.C. §§ 7251-7259, Pet. App. A62, is a "complex and complicated interplay of federal taxpayer support, federal order reform, California Fluid Milk Standards and California make allowance issues." Hillside Pet., p. 12. "Taken together the California and federal system interact to create both regulated milk prices and a minimum price safety." *Id.* The amendments to California's pooling and pricing system have been in place since 1997. Petitioners have pointed to no adverse national or widespread impact, though they allege this to be the case in conclusory terms. *See* Argument at p. 11, *supra.* In an area of asserted economic delicacy, *see* Ponderosa Pet., p. 7 ("Even a relatively small increase or decrease in national milk production will produce a significant change of commodity prices and, therefore, farm milk prices"), where Congress has unmistakably given California great latitude in at least some areas of milk-production regulation, Congress is better suited to sort out the competing interests. *Cf., Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. . . . [A]s a rule, the adjustment of

interests in this context is a task better suited for Congress than this Court.")

D. At Best, Only The Kuipers May Have Standing to Press a Claim Under The Privileges And Immunities Clause, And There Is No Evidence That They Have Sustained Any Burden as a Result of Their Arizona Residency; Furthermore, The Petition on Its Face Demonstrates The Insufficiency of This Claim

Petitioners in No. 01-950 do not present a question concerning the Privileges and Immunities Clause. Only Petitioners in No. 01-1018 seek consideration of such a question. *See* Ponderosa Pet., p. i, ¶2. Of those petitioners, however, it would appear that most have no standing to press the claim. Petitioner Ponderosa Dairy is an operating unit of Rockview Dairies, which is owned by a California corporation. Ponderosa Pet., p. 3. As corporate subsidiaries, neither Ponderosa nor Rockview Dairies has standing to assert a claim under the Privileges and Immunities Clause. *Western and Southern Life Ins. Co.*, 451 U.S. 648, 656 (1981). Indeed, the claims of all corporate dairies were dismissed by the Court of Appeals on this very ground, Pet. App. A13-A14, and none of the petitioners has sought review by this Court of that basis for dismissal. Accordingly, neither Ponderosa Dairy nor Rockview Dairies has standing to petition on the privileges-and-immunities question presented in No. 01-1018.

Petitioner Pahrump Dairy, also a petitioner in No. 01-1018, is a Nevada dairy operated by a California partnership. Ponderosa Pet., p. 3. Even assuming that partnerships have standing to assert claims under the

Privilege and Immunities Clause, *but see, Paul v. Virginia*, 75 U.S. (8 Wall) 168, 177 (1869) ("The term citizens [as used in Article IV Privileges and Immunities Clause] applies only to natural persons . . . not to artificial persons created by the legislature"); *W.C.M. Window Co., Inc. v. Bernardi*, 730 F2.d 486, 492-493 (7th Cir. 1984) (unincorporated association not a citizen for purposes of Privileges and Immunities Clause), a *California* partnership obviously has no standing to claim a deprivation of rights under the Privileges and Immunities Clause by the very State of its residence. *See Slaughter-House Cases*, 83 U.S. 36, 77 (1872) (Privileges and Immunities Clause provides "no security for the citizen of the State in which [rights] were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.")

This leaves, then, only Petitioners Darrel and Diane Kuiper, natural persons doing business as D. Kuiper Dairy in Arizona, as the sole petitioners capable of asserting a claim under the Privileges and Immunities Clause. Ponderosa Pet., p. 3. These petitioners, too, declined to amend their complaint so as to present evidence in support of their allegation of discrimination, so there is no record evidence upon which to evaluate the validity of their claim.[5] Moreover, these petitioners cannot rest on generalized allegations of discrimination in the complaint below. *See* Pet. App. A10-A12. Those disabilities were

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[5] Indeed, although the Petition in this Court asserts that the Kuipers reside in Arizona, Ponderosa Pet., p. 3, that fact is not alleged in the complaint below.

alleged to be suffered as well by Ponderosa Dairy, Rockview Dairies, and Pahrump Dairy – Nevada dairy operations that are owned by a *California* corporation and partnership. From the face of the complaint, then, these disabilities cannot be said to depend on the residency or citizenship of the owner of a dairy.

Petitioners cite no authority for the proposition that a violation of the Privileges and Immunities Clause can be based on other than residency. Residency preferences were at issue in each of the cases cited by the Ponderosa petitioners, *Chalker v. Birmingham & N.R. Co.*, 249 U.S. 522 (1919); *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1977). In *Chalker*, the Court overturned a Tennessee statute requiring out-of-state construction companies to maintain an office in Tennessee, or pay a higher tax for the privilege of doing business there. In *Tolchin*, the Court of Appeals upheld New Jersey's express requirement that to practice law in that State, an attorney must maintain "a bona fide office for the practice of law in this State regardless of where the attorney is domiciled." 111 F.3d at 1113.

If there are other disabilities that are *uniquely* suffered by non-California owners of out-of-state dairies as a result of the 1997 price pooling system, these can be alleged and tried in other proceedings.[6]

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[6] Indeed, Petitioners nowhere suggest that non-California owners of dairies within California are treated any differently than are California owners of California dairies.

CONCLUSION

For the foregoing reasons, Respondents urge the Court to deny the petitions for certiorari.

Dated: March 5, 2002

Respectfully submitted,

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§ 61801 Public interest; police powers

The production of market milk is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

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§ 61802 Legislative statement of fact and policies

The Legislature hereby declares all of the following:

(a) Market milk is a necessary article of food for human consumption.

(b) The production and maintenance of an adequate supply of healthful market milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and the production, transportation, processing, and storage of market milk in this state is an industry affecting the public health.

(c) Because of the perishable quality of milk, the nature of milk production, the varying seasonal production and demand factors, and other economic factors affecting the milk industry, the potential exists for economic disruption, in the absence of regulation, in the production, marketing, and sale of market milk which may constitute a menace to the health and welfare of the inhabitants of this state and may tend to undermine sanitary regulations and standards of content and purity, however effectually the sanitary regulations may be enforced.

(d) Health regulations alone are insufficient to prevent economic disturbances in the production of milk which may disrupt the future supply of market milk and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity.

(e) It is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including market milk, and to eliminate economic waste, destructive trade practices, and improper accounting for market milk purchased from producers.

(f) It is recognized by the Legislature that the economic factors concerning the production, marketing, and sale of market milk in California may be affected by the national market for milk for manufacturing purposes.

(g) It is recognized by the Legislature that in recent years the supply of manufacturing milk in California, as defined in Section 32509, has consistently declined and continues to decline, and that market milk has virtually supplanted manufacturing milk for manufacturing purposes in this state, and that it is therefore necessary to conform the pricing standards governing minimum producer prices for market milk established under this chapter to current economic conditions.

(h) It is recognized by the Legislature that the levels of retail prices of milk and milk products paid by consumers are affected by a large number of economic and other factors apart from minimum producer prices for market milk established under this chapter, many of which factors are not within the power of the director to regulate or control, particularly since the Legislature

repealed provisions concerning establishment of minimum wholesale and retail prices. It is further recognized by the Legislature that, in order to accomplish the purposes of this chapter and to promote the public health and welfare, it is essential to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk in the various classes, and that minimum producer prices established under this chapter should not be unreasonably depressed because other factors have affected the levels of retail prices paid by consumers.

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§ 62700 Business affected with public interest; Exercise of police powers

The production and distribution of fluid milk and fluid cream is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

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§ 62701 Declaration of policy; Marketing and consumption of milk and cream

It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to public health

and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity; that it is a policy of this state to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including fluid milk and fluid cream, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

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§ 62702 Declaration of purposes

It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable

prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the director to equalize gradually the distribution of class 1 usage among the producers of this state.

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§ 62703 Establishment of production base and pool quota; Use of pooling plan formulated by director

In effectuating the purposes of this chapter, a production base and a pool quota shall be established for each producer pursuant to Section 62707. The establishing of these bases and their functions shall be as provided in the pooling plan formulated by the director pursuant to the provisions of this chapter.

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§ 62704 Development of pooling plan

The director is authorized to develop a proposed pooling plan and to designate the proposed areas in which the plan will be made effective. He shall appoint fluid milk producers, and representatives of producers, to be the members and alternate members of a formulation committee, reasonably representative of all producers and areas to be included in the proposed pooling plan, which committee shall advise and assist the director in

the establishment of the proposed pooling plan area and in the formulation of the proposed pooling plan. The pooling plan shall include all areas covered by stabilization and marketing plans under Chapter 2 (commencing with Section 61801), except any relatively isolated region of the state may be excluded therefrom, if the director, after a public hearing, finds that the inclusion of the region is not practical or in conformity with the purposes of the pooling plan, or if he finds that the producers in the relatively isolated region do not desire to be a part of either their own or one of the pools.

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§ 62711 Amount payable for fluid milk production

(a) Except as provided in subdivision (h) of Section 62707, each producer shall be paid the highest usage for that amount of his or her fluid milk production that is equal to his or her pool quota and shall be paid the next highest usage for the difference between his or her pool quota and his or her production base under the production pool designated pursuant to this chapter and the lowest usage for all milk produced in excess of his or her production base under the overproduction pool designated pursuant to this chapter.

(b) In calculating the pool value, the volume of milk that has been classified as restricted use market milk shall be credited to the handler at the class 4a or class 4b price, whichever is lower.

Excerpts of Pooling Plan for Market Milk, as amended effective July 1, 1997 California Department of Food and Agriculture

Article 9. Computation of Handler Obligation and Quota, Base, and Overbase Pool Prices

Section 900. The gross pool obligation of each handler for each of the plants or for a cooperative association acting as a handler under Paragraph 105(c) shall be computed as follows:

(a) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each plant by the appropriate price announced for such class by the secretary, f.o.b. such handler's plant or the pool or nonpool plant to which diverted;

(b) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each cooperative association acting as a handler under Paragraph 105(c) by the appropriate price announced for such class by the secretary, f.o.b. the pool or nonpool plant where the milk was first received from producers;

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